No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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Pursuant to the order made at the oral argument of the above entitled cause, and in answer to the brief of the defendants in error filed since the argument, plaintiffs in error submit the following:

1. THE POINTS OF PLAINTIFFS IN ERROR REMAIN UNANSWERED.

With due respect to counsel for defendants in error, we submit that the brief filed herein by him on their behalf does not, in any respect, touch the real point to be decided by the court in this case. Counsel urges contentions which nobody has disputed, and he cites authorities upon propositions

which have been accepted by us *in limine*. Although we have accepted all the implications of the rule, he has devoted the greater portion of his brief to the support of the proposition that rulings at a trial cannot be complained of on a writ of error unless excepted to at the trial and thereafter made a portion of the record by a bill of exceptions.

And upon the real question, the question of the proper rule of damages to be applied to the facts stated in the complaint—the real point to be decided here—it is needless to point out that counsel has not questioned our position in any respect. We have urged it in several paragraphs of our brief, in particular in paragraph VI, and we have supported our propositions by abundant authorities. We noted in particular the cases of

Lowe v. Turpie, 44 N. E. 25;
Blood v. Wilkins, 43 Iowa 467.

Counsel has not even noticed these authorities nor questioned their force in any way, or indeed challenged our propositions as to the true measure of damages. He has cited no authority in opposition to the cases cited by us and from the fact that we have been unable to find any such, we may conclude that counsel was unable to cite authorities in opposition. Hence we are justified in concluding that the law is truly stated in such cases as Lowe v. Turpie and Blood v. Wilkins, and that counsel cannot gainsay our position on that point, which is the vital point in this case.

2. NO CONTROVERSY OVER LAW AS TO RECORD ON WRIT OF ERROR.

The law relating to the questions which may be considered on writ of error, is really well settled and may be summarized as follows:

(a) If the complaint is wholly defective in that it omits the averment of a material fact, the defect is always before the trial court as well as the appellate court, for the reason that the complaint does not support the judgment. The defect is commonly raised by general demurrer, but it need not be; it is not waived by failing to demur. The defect may be raised after judgment by motion in arrest; it is not cured by verdict. It needs no bill of exceptions to present it, for it arises upon the record or judgment roll; it is available whether a demurrer be interposed or not, or whether exceptions be taken at the trial or not.

World's Columbian Ex. v. Republic, 91 Federal 64, 76;

Slacum v. Pomeroy, 6 Cranch 224;

Ohio E. C. Co. v. Le Sage, 59 Cal. Dec. 331, 332.

(b) If the complaint contains the necessary facts but they are defectively stated, or if the complaint be inartificial or uncertain or ambiguous, such defects are deemed waived unless specially demurred to. If no demurrer be interposed, they are waived by answer over, or cured by verdict. While a bill of exceptions is not necessary, for the special demurrer and ruling thereon are already parts of the

record, the defect is not available in the appellate court unless a special demurrer be interposed and ruled upon, although an exception to the ruling need not be taken.

(c) If the complaint is sufficient, or being uncertain, it is answered without a demurrer, yet at the trial, errors are made against a party, either in receiving evidence or instructing the jury, such errors must be excepted to at the trial and preserved in a bill of exceptions in order to be reviewed on a writ of error.

Counsel in paragraphs I, II, IV and VI of his brief, has reiterated again and again the rule last referred to and has cited numerous cases in support. His reasoning might be in point if it were in answer to any argument of ours as to a given error of law made at the trial in *receiving testimony* or *instructing* the jury, but we have argued no such "trial errors" in our opening brief; we are unable to appreciate the relevancy of his argument upon these questions, for the points we have urged, whether well taken or not, are within the rules stated in the first paragraph above.

These propositions are no longer debatable. Thus in the case of

> World's Columbian Ex. v. Republic, 91 Federal 64, 76, the

the court said:

> "It is fundamental that a judgment cannot stand unless the facts of record,—apart from any showing by a bill of exceptions, aided as

far as may be by the verdict, will support it. *This rule holds equally where no point of the kind was made before the trial judge, either by demurrer* or motion in arrest of judgment. Slacum v. Pomeroy, 6 Cranch. 224; United States Bank v. Smith, 11 Wheat. 172; Funk v. Piper, 50 Ill. App. 163; Pennsylvania Co. v. Congdon, 134 Ind. 226; 33 N. E. 795. In entering the judgment the trial judge necessarily rules or assumes that the record itself—not matters to be presented by bill of exceptions, contains the showing of fact on which such judgment may be lawfully predicated. If the record be insufficient, then, in strictness, the error occurs in entering the judgment. Where there was neither a demurrer nor motion in arrest there may have been no error of any kind up to the entry of judgment."

The case of

New Orleans Ins. Ass'n v. Piaggio, 83 U. S., (16 Wall.) 378; 21 L. ed. 358,

cited in the opening brief for plaintiffs in error, is to the same effect. That is a very instructive authority which supports our position here, and bears a very striking analogy to the case at bar. There the action was upon contracts of insurance, under which circumstances the measure of damages would have been the value of property lost. This value was alleged and established and found by the jury. But the plaintiff had claimed in his complaint, in addition to the value of the property lost, the further sum of $15,000.00 as damages for the delay and failure to pay the loss when due, and $5000.00 was allowed as such damages.

Upon a writ of error to the Supreme Court of the United States it was urged, that an erroneous rule of damages was applied by the lower court in sustaining the verdict and entering judgment, in that the damages for failure to pay the amount of the policy could only have been interest on the sum found due, and that other damages for such delay were too remote. And it was further urged that such was error "on the face of the record without any reference to any possible evidence or ruling at the trial". Touching the latter point the court said:

> "Errors apparent in other parts of the record may be re-examined, as well as those which are shown in the bill or bills of exceptions, and it is too plain for argument that the verdict and judgment are a part of the record. Whenever the error is apparent in the record the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error in the foundation proceedings, judgment or execution of a suit in a court of record."

It is true that in the case there were five several bills of exceptions. These are referred to *seriatim* at the close of the opinion and held not well taken. They do not present the point above referred to; it was considered that such point arose on the record alone. In the last analysis the point really arose on the complaint. The complaint stated the controversy, and set out the relevant facts from which the court could apply the proper rule of damages to be allowed on account of the breach of contract

averred. When it appeared that the verdict and judgment was far in excess of the proper rule of damages flowing from the facts averred, the Supreme Court modified the judgment and reduced the verdict and judgment to a proper amount.

Here the controversy is practically the same; the contract is set forth in the complaint; a breach is alleged, whereupon it became a question of law for the trial court in the first instance and for this court now to apply the legal measure of damages. And if we are right in our contention as to the proper measure of damages in this case, it is manifest that the verdict and judgment are far in excess of the true damages properly allowable. Accordingly such a point arises upon the record without the necessity for a bill of exceptions and without any reference to any possible evidence or ruling at the trial, just as a similar situation in the Piaggio case enabled the appellate court to review the controversy and modify the judgment accordingly. Hence, it appears that there is no tenable objection to a hearing of the points urged by plaintiffs in error on the merits, that the questions argued arise upon the record that is now before the court.

Counsel is not entirely fortunate in his citation of authority. Thus the case of

> Mitsui v. St. Paul Fire & Marine Ins. Co., 202 Federal 26, 28,

cited at the opening of his brief, is really against him. For following the quotation contained in his brief, the opinion proceeds:

> "But this is no obstacle to the court's considering such questions as may arise upon the record and which it is not the office of the bill of exceptions to present."

And, again, it is said:

> "Whenever error is apparent upon the record, it is open to revision whether it be made to appear by bill of exceptions or *in any other manner.*"

Thereupon the court proceeded to consider the sufficiency of the complaint, and finding it insufficient reversed the case. It gave consideration to the contract of the parties, which was set forth in the complaint as an exhibit, and determined that upon the conceded facts the plaintiff was not entitled to recover the sum awarded. Such is exactly what we are urging the court here to do, viz.: To consider the contract of the parties which was set forth in the complaint, and determine the proper rule of damages, which being determined, it will appear that the verdict and judgment are unsupported by the complaint as to a large amount.

We have not space to refer in detail to the other cases cited by counsel on the law of appeal and error, but on examination it becomes clear that he has not entirely apprehended the meaning of the cases cited, and that not one of the cases militates in any way against the propositions of the law of record on appeal hereinabove stated, but that they entirely support them.

3. RELIEF ON APPEAL WILL BE GIVEN WHERE THE JUDGMENT IS ONLY IN PART SUPPORTED BY THE COMPLAINT.

Our contention on this writ of error has been twofold. We urge in paragraph XI, that for the reason therein set forth, the complaint is insufficient to support any judgment in favor of plaintiffs. But we have also urged that, conceding that the complaint may be sufficient to support a judgment for a certain sum against defendants, it is insufficient to support the judgment rendered as to a large amount. In such case it is a mere truism of appellate practice that the judgment must be modified or scaled so as to remain supported by the complaint. Thus, if the complaint be in two counts, one bad, and the judgent is for the full amount claimed in both, it must be modified by being reduced to the amount of the good count. Or the judgment may be supported by the complaint as to one party and not as to another; it will be modified so as to relieve from its operation the party as to whom it is unsupported by the complaint. Here the situation is exactly the same. If the full damages that can be allowed under the conceded facts would be twenty-eight hundred and fifty ($2850.00) dollars and interest, then the judgment is unsupported as to the excess over that amount.

For example, suppose a plaintiff avers that a defendant made to him a promissory note for $2850.00 and interest, that the note is past due and the defendant has failed to pay and in his prayer plaintiff prays for judgment ten times the amount called for by the note and obtains a verdict for the amount

prayed. Would any one contend that upon appeal or writ of error, an appellate court would not hold that the judgment was unsupported, would not, as a matter of law, apply the proper rule of damages to the breach of contract shown, and when it appeared that the judgment far exceeded any legal amount of damages that could flow from the conceded facts, it would not either modify the judgment if it had sufficient data, or send the cause back for a new trial if it had not? And would it be contended that the appellate court would be prevented from such a just decision because no demurrer had been interposed or ruled upon, or because no objections were taken at the trial or preserved in a bill?

Where a judgment is only in part supported by the averments of the complaint, the appellate court on appeal will, on the record alone, either reverse the judgment or so modify it as to remain not unsupported.

New Orleans Ins. Ass'n v. Piaggio, 83 U. S., (16 Wall.) 378; 21 L. ed. 35;
S. F. Sav. Un. v. Myers, 76 Cal. 624;
Cummings v. Cummings, 75 Cal. 434, 442.

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4. A DEMURRER WAS NOT NECESSARY.

Counsel argues, in subdivision II of his brief, that the demurrer in this case was abandoned or waived. But we need not further notice this point. We have not argued any questions which were nec-

essarily raised by special demurrer. The points we have urged, if well taken, would be reached by general demurrer, and as far as the demurrer was general, it need not be interposed or ruled upon at all. The point would arise upon the complaint without a demurrer. Again counsel has raised a straw man.

World's Columbian Ex. v. Republic, 91 Fed. 63;

Western U. Tel. Co. v. Sklar, 16 Fed. 295, 302;

Ohio E. C. Co. v. Le Sage, 59 Cal. Dec. 331, 332.

The California case of

Sledge v. Stolz,

is cited in this connection; and the claim is apparently made that under section 4½ of article VI of the Constitution of California, the matters here urged can not be reviewed. But while that section, like charity, has covered a multitude of sins, even if it were applicable to federal procedure, it could not be considered as making up for a *material deficiency* in the *complaint*. It is designed to cure mere errors of procedure—adjective law—which do not deprive of a substantial right, but where the issues between parties is, as here, a matter of substantive law, it can have no application.

The same may be said of section 269 of the Federal Judicial Code as amended. If it be given effect in considering questions of ultimate right between the parties, it would be construed to allow the appellate

court to look beyond mere deficiency in assignment of error, or failure to except, and base its judgment upon the real merits of the controversy. Such a construction has been given to section 269 as amended, in a criminal case. But the implication which counsel seeks to deduce from the holding of the California Appellate Court in Sledge v. Stolz, has been negatived by the later decision of the Supreme Court of this State, in the case of Ohio E. C. Co. v. Le Sage, supra.

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5. THE COMPLAINT IS NOT AIDED BY ANSWER.

The answer consists generally of denials, adding nothing to the record. Counsel quotes, however, an allegation from the answer appearing at page 26 of the Transcript, to the effect that after the execution of the deed of trust, Lineker, from time to time, procured other advances thereunder until the amount due upon the said deed of trust was in excess of the sum of $7000.00.

Apparently it is claimed that this constitutes an aider by answer, but it cannot be taken as such aider for several reasons. No such averment of an answer can be considered as an aider of a complaint unless the allegations would have been sufficient to meet the defect, if in the complaint.

> Hibernia Sav. etc. Sy. v. Thornton, 123 Cal. 62, 64.

Here nothing appears to the effect that Mrs. Dillon ever agreed to stand good for such future ad-

vances. It would be remarkable if she had done so. At the time her promise was made, it appears that demand of payment was only of the $2850.00 debt: "*Said note* and interest." Moreover, if the amount, within Mrs. Dillon's promise was $7000.00 instead of $2850.00 and interest, it would still be many thousands below the amount of the judgment. Therefore, the particular defect in the complaint, urged here, was not aided by answer.

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6. THE DISTRICT COURT WAS WITHOUT JURISDICTION OF THE CAUSE.

We may concede that our point in regard to the defect in the jurisdiction of the District Court, is dependent upon our construction of the complaint, as hereinabove discussed. If it be true that the only damages supportable on the complaint, would be the amount of the McColgan note and interest, then manifestly the case is within the express holding of the case cited by us on the point.

Vance v. W. A. Vandercook Co., 170 U. S. 468; 42 L. ed. 1111.

The case is not one where the amount claimed may be reduced by defensive matter brought in the case by answer; therefore, the cases cited by counsel do not apply.

7. PLAINTIFFS IN ERROR HAVE CONFORMED TO THE RULES OF THIS COURT.

Animadversion appears at page 22 of counsel's brief in respect of our alleged "utter disregard of all of such rules" in our brief, and that no attempt is made by us "to comply with the rules". A moment's consideration may be given to obedience to the rules by counsel respectively.

Under rule 24 of this court, we were required to open our brief "with a concise abstract or statement of the case". To this rule we have strictly conformed. Since no bill of exceptions could have been obtained and we were confined to the record, and saw that the questions we sought to raise, appeared from the complaint alone, proper compliance with the rule required us to set forth the substance of the provisions of the *complaint*. This we have strictly and correctly done in pages 2-5 of our brief.

The rule further provides that the defendants in error need not make such a statement, "unless that presented by the plaintiff in error is controverted". They have made such a statement in pages 1-6 of counsel's brief. We particularly invite the court to compare the accuracy of the respective statements as to agreement with the averments of the complaint, in pages 1-11 of the transcript. It will be noted that counsel's statement is not correct; that it does not appear from the complaint that the trust deed given to McColgan was "also to secure future advances", or "also to secure all costs and liens

that might be thereafter unpaid upon the lands", or "also to secure all expenses that might be incurred by the McColgan's in connection therewith" (see paragraph XIII of the complaint, Tr. p. 7).

It is there alleged, that *a promissory note* was made to McColgan for *$2850.00* and that a trust deed was given "to secure the payment *thereof*". Not a word is said as to the other features. The statement is further inaccurate in that it is not alleged in the complaint that any money was subsequently borrowed by Lineker, or that she turned over such sums to Winter, or that Lineker thereafter demanded of Dillon that she pay those sums, or any sum but the $2805.00 note, or that Dillon promised to pay any McColgan debt other than the $2850.00.

It will be noted therefore, that the statement of plaintiffs in error, not only conformed to the rules, but is strictly accurate, and that the statement of defendants in error is not accurate.

It is also insisted, that plaintiffs in error can not have a consideration of the evidence in this case on account of the failure to except to rulings at the trial, or to preserve such exceptions in a bill. Yet counsel does not hesitate, himself, to import into the record evidence and instructions, and to base his argument in part upon such matters entirely *de hors* of the record (see pages 4, 5 and 6 of brief for defendants in error).

8. THE STATEMENTS OF COUNSEL DE HORS THE RECORD MAY YET BE CONSIDERED AS ADMISSIONS AGAINST INTEREST.

The matter above referred to, set forth in the brief of defendants in error, contrary to rule, while it cannot avail them anything, may be considered against them as far as it constitutes an admission against interest. An appellate court may take statements of a brief on appeal as true, where they are in the nature of admissions against interest. This rule was applied by the Circuit Court of Appeals of the Third Circuit, in the case of

Pitcairn v. Philip Hiss Co., 113 Fed. 492, 495.

Accordingly, if the court will give consideration to the statement contained in counsel's brief in the paragraph beginning at the bottom of page 4, in connection with the averments of paragraph XXI of the complaint (Tr. p. 10), our argument, in subdivision 7 of our opening brief at page 20, will appear even more pertinent.

It thus appears, even more clearly, that the alleged loss of Svensen's property was not under proceedings taken under the trust deed referred to in Mrs. Dillon's alleged promise. It was alleged in the complaint that Svensen's loss of property was under "various *other* proceedings had and taken by and on behalf of McColgan". It now appears from the statement that such "other proceedings" were a sale in 1917 under a second and entirely different

trust deed from the one referred to in the complaint. That certainly would not be the proximate result of any alleged breach of Mrs. Dillon's promise; damages flowing from said last sale, under all rules, would be entirely too remote; Svensen could just as well have pursued Dillon all through her life for any loss through unfortunate investments, upon the theory that her solvency might have been weakened by the original transaction.

It does not *appear* from the *complaint* that there was any loss of property to Svensen from any sale under the first trust deed. It is made clear from counsel's *statement,* that there was *no such loss,* for immediately Svensen borrowed money from one Connors on the *security* of the *property,* and at the same time gave a second trust deed thereon to McColgan, and she *continued* to *own* the *property,* or *interest thereon,* until the final sale under the second trust deed in 1917. It must be clear that if she redeemed from a sale under the first trust deed in 1914, or, if what amounted to the same thing, she caused the property to be bid in by her representative at that sale, then under any view, the value of the real property would have had no relation to her alleged loss.

In any view Svensen's loss in 1914, on account of the first trust deed, could only have been the amount she was justly to pay McColgan thereunder. This, from counsel's statement could *not have exceeded $14,000.00,* but it was certainly even less than that,

for Mrs. Dillon was not responsible if McColgan "so manipulated the matter that he received" a greater sum than was justly due him. Mrs. Dillon, as we have shown in paragraph 7 of our opening brief, was not responsible for McColgan's wrongful acts, which constituted the "pigeoning" of Svensen referred to in the instructions quoted by counsel.

According to the complaint, Mrs. Dillon only agreed to pay the $2850.00 note. If that sum was afterward enhanced either by Svensen's further borrowings for her own use, or by McColgan's wrongful exactions, Mrs. Dillon would not be responsible. Yet we learn from counsel's statement, that aggregating all of such elements, whether with or without right, the total obligation could not have exceeded $14,000.00; yet judgment was entered for $28,000.00.

CONCLUSION.

Mindful of the limitations of appellate practice as to questions that may be agitated, we have wholly refrained from discussing the evidence in this case. Had we been able to bring the evidence here, we would be required to accept as conclusive facts found upon conflicting testimony.

But our silence upon those questions may not be construed to mean that we concede that the contract sued upon was ever made, or that it is not incredible that, if made, Mrs. Dillon would have been sued upon it long before, especially so, when for upwards of

seven years the efforts of Miss Svensen, according to her claim, were concerned in financing and taking care of the original McColgan debt, and when during that time, at least two actions were commenced against her by Mrs. Dillon wherein she set up counterclaims; yet at all times she was silent as to the alleged original verbal promise of indemnity.

Yet accepting as perforce we must, the claim of Svensen, as to the making of this contract, we are entitled to rely strictly upon the averments of her complaint. And from such allegations together with the above mentioned statements of counsel, this court is enabled to reach close to the heart of the next real controversy in the case,—the question of the true amount of Svensen's proximate damage from the facts pleaded.

As to those questions, we are entitled to ask the court, under the provisions of section 269 of the Federal Judicial Code, cited by counsel, to look at the entire record *now* before the court, and to disregard technical errors, defects and exceptions; to look through and beyond them to the real controversy and to decide this case, as to this point, upon the ultimate merits, and to hold that Mrs. Dillon is not responsible for either remote consequences, or for the neglect of Svensen, or wrongful acts of McColgan. Under no conceivable circumstances, in view of the facts pleaded and the facts adduced by counsel, could the judgment justly have equaled the amount for which it was rendered.

Again we submit, that as to the real controversy, the measure of damages, counsel is wholly silent; that our position is well based, supported by authority, is absolute justice, and should secure to us a reversal of this case to the end that justice may be done.

Dated, San Francisco,
June 21, 1920.

SAMUEL M. SHORTRIDGE,
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